Supreme Court, U.S.
FILED
APR 1 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1634

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1981

DuBROOK, INC., a corporation,
Respondent

vs.

THE W.B. GIBSON COMPANY, a corporation,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Where control over the concrete delivered to a job is assumed by the purchaser of the concrete, is the seller of the concrete barred from recovery of the sale price and damages if the concrete fails to meet specifications to which the purchaser is held by contract with a third party?

   Negatived in the courts below.

2. May a judge conclude that a counterclaim lacks credibility where the contractor never assigned inadequacies of concrete as a cause of job delay and never made a dollar demand for adjustment of accounts for deficiencies in the concrete until five days after suit was filed by the seller of the concrete?

   Affirmed in the courts below.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DuBrook, Inc., a Pennsylvania corporation, the Respondent herein, offers the following as and for its Brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, whose Judgment Order was entered in the above captioned case on November 30, 1981:

Opinions Below

The Opinion of the United States District Court for the Western District of Pennsylvania and its affirmance by the United States Court of Appeals for the Third Circuit are adequately set forth in Appendix A of the Petitioner's Brief. It should also be noted that the affirmance by the Third Circuit was without Argument.

Counterstatement of the Case

Respondent adopts as its Counterstatement of the Case the Preliminary Statement and Findings of Fact of the United States District Court for the Western District of Pennsylvania, as contained in Appendix A of the Petitioner's Brief at pages A1 through A15.

Reasons for Denying the Writ

1. BASED UPON THE FACTS OF THE CASE AND ELEMENTARY CONTRACT LAW, THE DECISION BELOW IS CLEARLY CORRECT.

A careful review of the facts in this case indicates that the case involves really no more than any other typical, day-to-day, failure to pay controversy. Notwithstanding the Petitioner's insistance to the contrary, the terms of the

contract and their related technical niceties have little to do with what happened and with how the case has been decided. The District Court had available to it a detailed record of the trial and the benefit of an Argument at length in which the Petitioner attempted to deny responsibility and culpability for the problems which were encountered in the performance of the contract. Nevertheless, the record presented such a clear and uncontroverted line of developments during the performance of the contract, that the court found no difficulty in finding for the Respondent. And, apparently, the Third Circuit panel that reviewed the record also felt so moved, so much so that it cancelled the Argument on the Petitioner's appeal to that court.

The law in this case is simple and has been correctly applied:

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.

Restatement, Second, Contracts § 202(4)(1981). Here, the Petitioner's responsibility, involvement, and participation in changes in the concrete mix were sufficient to convince both courts below that the Respondent had fulfilled its obligations under the contract. Pennsylvania case law clearly confirms this position. Commonwealth Dept. of Transportation v. W. P. Dickerson & Son, Inc., 42 Pa. Commw. Ct. 359, 400 A.2d 930 (1979). C. J. Langenfelder & Son v. Commonwealth Dept. of Transportation, 44 Pa.

Commw. Ct. 585, 404 A.2d 745 (1979).

2. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS.

Petitioner cites two Ninth Circuit cases, one case from the United States District Court for the Eastern District of Pennsylvania, and one case from the Texas Court of Appeals. Petitioner asserts that the holdings of these cases and the decision in the instant case create a conflict among the Circuit courts so as to provide a reason for this Court to consider the within Petition pursuant to Supreme Court Rule 17.1(a). Such a contention is so incredible that no answer might be the appropriate reply, given the fact that Rule 17.1 indicates that a Petition for Writ of

Certiorari "will be granted only when there are special and important reasons therefor." However, a few words of rebuttal will be offered.

First, their can be no doubt that the Circuit courts do not conflict in their decisions relating to how contracts ought to be interpreted. These courts all agree that the test of interpretation is one that views a contract as a whole, including any actions which the parties may have taken in the performance of its terms.

Second, the cases cited by the Petitioner are all clearly distinguishable from the present case. Careful reading of these cases indicates that the distinguishing factor is, again, crucial facts which impact upon the interpretation of the respective contracts under basic contract

law. In the interest of brevity, it may be said with accuracy that each case cited by the Petitioner contains a fatal flaw (i.e. incorporation by reference, agreement to replace defective concrete, batching mistake by supplier, collateral agreement by supplier, etc.) which results in an appropriate holding. None of these factual flaws are present in the instant case. Petitioner's attempts to convince any court to view this case as a concrete case rather than a contract case are without merit.

3. THE CASE PRESENTS NO CONSTITUTIONAL QUESTION.

The Petition for Writ of Certiorari alludes to deprivation of Petitioner's

"constitutionally protected property and contract rights." Petition at i. However, Petitioner does not explain how or in what manner it may have been deprived of those rights without due process. In fact, Petitioner makes no due process claim at all, but rather, (apparently by osmosis), contends that somehow there has been deprivation of property. It may be true that, should the decisions below be allowed to stand, Petitioner will be deprived of property. However, it is clear from the record that this deprivation of property was not without due process of law. Petitioner had the benefit of a full trial, Argument on the merits, decision on the complete record in accordance with Petitioner's agreement, and the exercise of its right of appeal to the Circuit court. There are no procedural defects, and the Petitioner has no due process claim.

Conclusion

Based upon the reasons set forth above, Respondent respectfully requests that this Court deny the within Petition for Writ of Certiorari.

Respectfully submitted,

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